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# Supreme Court of the United States

**OCTOBER TERM, 1941**

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**No. 167**

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**SONKEN-GALAMBA CORPORATION, a corporation, and W. C. BERRY,**
***Petitioners***

**vs.**

**BUTLER IRON & STEEL COMPANY, INCORPORATED, a corporation,**
***Respondent.***

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Circuit Court of Appeals determined and followed the applicable (Kansas) State law as required by recent decisions such as

*Klaxon Co.* v. *Stentor Elect. Mfg. Co.*, ..... U. S. ....., ..... S. Ct. ....., 85 L. Ed. (adv. op.) 969, No. 741.

*Griffin* v. *McCoach*, .....U. S. ..... .....S. Ct. ....., 85 L. Ed. (adv. op.) 972, No. 755.

Petitioner summarizes evidence most favorable to it but overlooks that it conflicts with facts found by the trial court and approved on appeal.

The contrast is illustrated (R. 217-218) where the opinion says:

"* * * The Court found as a fact that plaintiff and Horwitz Iron and Metal Company signed a written form of agreement on July 30, 1938 for sale of this scrap iron, but that the agreement never became operative but was abandoned by mutual consent because of a failure of a meeting of the minds with respect to the nature, kind and character of the material remaining on hand. The Court found that, 'The parties thereto under the facts disclosed by the evidence did not, in fact, reach a meeting of minds with respect to the subject matter of said contract.' This finding of fact, which is sustained by substantial evidence, removes from consideration the contention that the plaintiff elected to resell the undelivered property. What the rights of the parties would have been had the sale been completed need not be considered. There is no inconsistency of remedies in announcing an intention to make a resale or in unsuccessfully attempting to resell and in establishing the market value in an action for damages by evidence of market value. In each instance the seller has elected to hold the buyer liable in damages based on the difference between the contract price and the market value. A resale is but one method of determining the market price. The methods of establishing the market value by resale and of determining it by evidence other than by resale are analogous ways of establishing damages. They are designed to and should reach the same result. Pursuing consistent remedies alternatively to achieve a lawful end does not constitute an election of remedies. *Kansas City Live Stock Commission v. Hamlin Bank, Kans.*, 101 Pac. 617.***"

Yet (Petition P. 2) says:

"* * * it was conceded that a resale, pursuant to such election, had been made (R. 84, Ex. A. R. 46-49) and that subsequently, without notice to the buy-

ers (R. 83) and for private reasons existing between Butler and the purchaser at such resale (R. 49-50; 83), the contract of resale had been cancelled (R. 49-50) and that Butler had thereafter, without notice to petitioners (R. 85-86), applied said scrap in filling certain commitments it had with others.

The price obtained by Butler on the resale (under the contract which it subsequently cancelled) was substantially in excess of what the Court found to be the market price at the time of breach. The difference is approximately $1,500.00. * * * "

The questions presented, reasons relied on and specification of errors rest on the self constructed erroneous premises of fact.

Each specification of error assumes an election to resell, and that it constituted an election of remedies under Kansas law.

The error is disclosed by the opinion on rehearing in *Central Trust Company* v. *Adams,* 107 Kan. 492, 192 Pac. 761. Petitioner cites this but quotes only from the original opinion, 107 Kan. 126, 190 Pac. 755.

At 107 Kan. l. c. 495, the Kansas Supreme Court says:

" * * * Having chosen not to keep the goods to be delivered to the owner on payment of price, he could not sue for price. Goods on one side and price on the other resemble opposite terms of an equation, and whenever goods are eliminated, there is no equivalent for price. The right of the seller must then be stated in another way, that is, in terms of damages. Election to resell was an election to liquidate, as far as proceeds of resale would go, damages resulting from breach of the buyer's obligation to pay price and take the goods, and then to rely on an action for damages for the remainder of the loss, if any. In case of a fair resale, the measure of damages is the difference between the

net resale price and the contract price. The rule is precisely the same as if the contract had remained executory, and the seller had fixed his damages by proper resale. (*Hardwick* v. *Can Co.*, 113 Tenn. 657.)

It requires no argument to demonstrate that the theory underlying recovery of damages is inconsistent with the theory underlying recovery of price. This is just as true when the contract is executed as when it is executory. The two theories are utterly incompatible with each other, and because of that fact, election to proceed according to one of them renders the other unavailable. (*Ireland* v. *Waymire*, 107 Kan.. 384, 191 Pac. 304, and cases cited in the opinion.)"

It approves the doctrine of *Moore* v. *Potter*, 155 N. Y. 481, and quotes therefrom:

"'It is well established by the decisions of this Court that a vender of personal property, when the vendee has declined to take the property and pay for it, ordinarily has the choice of any three methods to indemnify himself against loss: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property and recover the difference between the contract price and the price obtained upon a resale, or (3) he may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price.' (p. 486.)"

In this case there was no effective resale. Respondent followed the indemnity choice numbered (3) above. As indicated in the Kansas rehearing opinion a resale price on a sale fairly conducted may be the best evidence of the market price.

Compare the following:

*International Trading & Rice Corp* v. *Benscheidt,* 141 Kan. 416, 41 Pac. (2d) 737, 738, (subd. 1, 2) where resale price of sugar was received as evidence of market price. Recovery was on basis of market price.

*Webber* v. *Umback,* 125 Kan. 117, 263 Pac. 786, where the market value was proved by evidence of the Kansas City hog market less freight, etc., and the sale price of the hogs in question was received to show market price, which governed recovery of damages.

*Montgomery County Nat'l* v. *Wherry,* 102 Kan. 224, 196 Pac. 1146, where an abortive conditional sale was held not to establish market price. The market price is held to fix damages for breach of purchase contract.

There is no inconsistency of remedies between claiming either the difference between resale or market price and the contract price. Often the resale price is the best evidence of market value.

That there was no such election of remedies is also disclosed by *Darnell* v. *Haines,* 119 Kan. 633, l. c. 634, 240 Pac. 582 which explains that following an incompatible cause of action makes the rule of election operative, but taking different compatible courses, even though proof and measure of recovery are dissimiliar, does not. The doctrine is harsh and its scope is restricted. *Oil Well Supply Co.* v. *First National Bank,* 106 Fed. (2d) 399. (Kan. C. C. A. 10). *Minneapolis Nat. Bank* v. *Liberty Nat. Bank,* 72 Fed. (2d) 434 (Kan. C. C. A. 10). In the absence of inconsistency of remedies, there is no election. *Midland S. & L. Co.* v. *Tradesmen's Nat. Bank,* 57 Fed. (2d) 686 (Kan. C. C. A. 10); *Union Trust Co.* v. *Wiseman,* 10 Fed. (2d) 558 (D. C., Oregon, cited because well reasoned.)

A mistaken notion in giving even a formal notice to resell is not an election. *Habeier* v. *Rogers,* 131 Fed. 43,

l. c. 45, (C. C. A. 2). Telegram advising plaintiff "would sell the goods and sue defendant for damages" was not an act required to pursue any remedy and was neither election or estoppel to maintain action for full purchase price. *Meyer* v. *W. R. Grace & Co.*, 290 Fed. 785, (C. C. A. 7), l. c. 787. Quoted from 20 C. J., p. 34 is:

> "The mere giving of notice of an intention to pursue a certain course, which is not acted upon by either party, or which does not alter nor affect the position of the party receiving it, is not such an election of remedies as will bind the party serving it so as to preclude pursuing a different course,"

An unconsummated agreement of resale is no evidence of market value. 55 *C. J.* 1057, *note* 22, and also *Montgomery County Nat. Bank* v. *Wherry, supra.*

Following a particular evidentiary method of proof of damage is not an election of remedies.

In *Stegman* v. *Offerle Coop. Grain and Supply Co.*, 151 Kan. 655, l. c. 657, 100 Pac. (2d) 635, it is said:

> " * * * Under different sets of facts the courts have used or approved the use of different measures of damages, the theory in each instance being to use the measure of damages which will enable plaintiff to be recompensed for the loss he has sustained.***"

It is submitted that the Circuit Court of Appeals correctly determined and applied the settled principles of Kansas law. No reason exists for certiorari and the petition should be denied.

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